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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 969

EDITH R. REYNOLDS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Edith R. Reynolds prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on November 5, 1964.

Opinions Below

The appeal to the Circuit Court was from a judgment entered on a jury's verdict. The District Court (Levet, J.) wrote no opinion. The *per curiam* opinion of the Circuit Court of Appeals (Circuit Judges Friendly, Kaufman and Anderson), printed in Appendix A hereto, *infra*, pages 16-17, is reported in 388 F. 2d 1.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 5, 1964. Rehearing was denied on December 11, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1). The time to file a petition for a writ of certiorari has not been extended.

Questions Presented

1. Whether in Federal valuation cases, in the absence of other or more comparable sales, proof of the sale of identical property six years after acquisition and substantially identical property seven years before may be excluded on the issue of valuation on the acquisition date?

2. Whether a District Court has the discretion to exclude evidence of bias in an opposing expert on the sole ground that a tax case is being tried before a jury?

3. Whether the arbitrary exclusion of evidence of a subsequent sale and of an expert's bias deprived petitioner of the right to be heard by a jury, and thereby deprived her of her property (over $200,000) without due process of law?

Statutes and Regulations Involved

Although no question is presented as to the meaning and effect of the statutes and regulations, the statutory provisions involved are sections 23(a) and 811(k) [now I.R.C. section 2031(p)] of the Internal Revenue Code of 1939, and Rule 43(a) of the Federal Rules of Civil Procedure, 28 U.S.C. The regulations involved are sections 20.2031-1(b) and 39.23(a)-15(k). Also involved is Revenue Ruling 59-60, promulgated March 2, 1959—26 CFR 20.2031-2, Sec. 4.02(g).

Statement

This is an action by petitioner pursuant to 28 U.S.C. Sec. 1346(a)(1) for a refund of federal income taxes.

In a marital settlement on July 1, 1947 taxpayer received one-third of the stock of corporations publishing daily newspapers in three cities in Arkansas and Oklahoma. She sold all of that stock in May, 1953 for $900,000. That sale was a taxable transaction and she owed a capital gains tax on the amount, if any, by which the sales price exceeded the fair market value of the stock on July 1, 1947 (Ap'lts Br., p. 2).*

These businesses were in the first magnitude of stability —immune to competition, long-established, seasoned and secure (Ap'lts Br., pp. 6-7).

It was plaintiff's case that her one-third interest was worth not less than ten and a half times earnings ($939,000) on July 1, 1947; or slightly more then than it was in 1953 (Ap'lts Br., pp. 9, 14-5, 21, 28).

To prove this she offered simple and unquestioned facts, which were excluded: that about four-fifths in worth of the businesses were purchased in 1940 at slightly over fourteen times earnings (Ap'lts Br., pp. 9, 14, 28), and that the sale of all of her stock in 1953 was on a basis of slightly over twelve times earnings (Ap'lts Br., pp. 15, 21).

Proof of the earnings for all years except 1946 and 1947 was excluded (Ap'lts Br., pp. 5, 14, 28-9), thus excluding from the jury the fact that the businesses were at the peak of their earning capacities on the valuation date (Plaintiff's Ex. 1 for id.).

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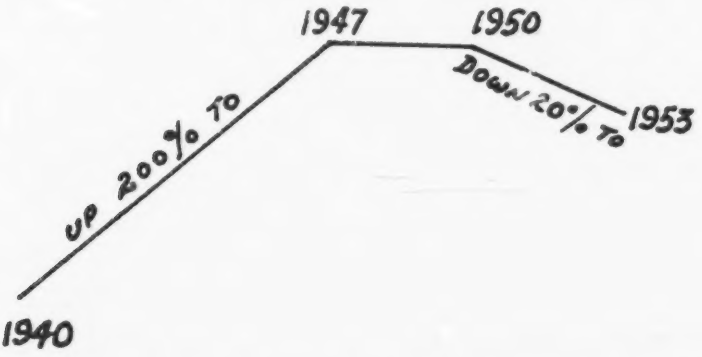
* For convenience the references are to the briefs which in turn refer to the record. There has never been any question that the briefs accurately reflect the record.

The excluded trend of earnings would have shown roughly (Ap'lts Br., p. 14; Pet. for Rehearing, p. 2):



With these exclusions, embodying the essence of plaintiff's case, the jury was left with nothing substantial or meaningful—only a perplexing mass of figures and facts contained in an audit for 1946 and 1947 and the opinions of experts—plaintiff's expert that her stock was worth ten and a half times earnings—$980,000 (Ap'lts Br., p. 9) and the Government's "field man" that it was worth less than two times earnings—$188,500 (Ap'lts Br., p. 10).

The exclusions deprived the jury of the knowledge that the first opinion was conclusively supported and that the second was wholly unsupportable.

The Government qualified plaintiff's former husband, Mr. Reynolds, as being the man "most acquainted with these corporations"—which he was. He asserted a valuation of taxpayer's stock at $300,000, 3⅓ times earnings (Ap'lts Br., pp. 14, 30-1).

Confused—as next appears—rather than informed, the jury quite naturally accepted $300,000,* the valuation of

* This finding by the jury of a valuation of $300,000 was, in effect, a finding of a tax liability of $150,000 plus interest. The sale was on an installment basis and only the years 1953 and 1954 are involved here. The subsequent years in which the remainder of the $900,000 purchase price was paid to the plaintiff have been held in abeyance pending final determination of this action.

one who knew most about these papers, who was wrongly "palmed off" on the jury as being completely disinterested, when in fact he was violently interested and biased (Ap'lts Br., pp. 30-2; Reply Br., pp. 2-3, 17-8; Pet. for Rehearing, pp. 4, 12-3).

The transfer in a marital settlement on July 1, 1947 was a taxable transaction to Mr. Reynolds. He owed a capital gains tax on the difference between the value of the stock on that date and what it cost him (Ap'lts Br., pp. 30-1; Reply Br., pp. 17-8; Pet. for Rehearing, pp. 12-3).* His position was directly the reverse of the plaintiff's. The less the value of the stock on July 1, 1947, the less tax he would owe. At a proper valuation of the stock, he owed and should have paid to the Government probably upwards of $200,000 (Ap'lts Br., p. 30; Reply Br., pp. 17-8; Pet. for Rehearing, p. 13). He paid no such tax and did not return the transfer, leaving him faced with the possibility of a fraud claim by the Government (Ap'lts Br., pp. 17, 31; Reply Br., pp. 17-8; Pet. for Rehearing, p. 13), all of which was excluded from the jury, to whom he was presented as completely disinterested.

After excluding the fact that Mr. Reynolds paid no tax, the trial court refused to charge that Reynolds owed and should have paid such tax and then proceeded to administer the *coup de grace* by placing a halo on Mr. Reynolds and inviting the jury to accept his testimony (Ap'lts Br., pp. 14-5, 30-2; Reply Br., pp. 2-3; Pet. for Rehearing, pp. 2-4, 12-3).

Moreover, Reynolds was the man who himself had paid $900,000, twelve times earnings, for the stock that he valued at 3⅓ times earnings, and he had paid that amount in 1953 when the earnings were 20% less than they were in 1947 (Ap'lts Br., p. 14; Reply Br., p. 16; Pet. for Rehearing, p. 3). Actions speak louder than words. If the fact of his purchase and its terms had not been excluded from

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* *Commissioner* v. *Mesta* (3rd Cir., 1941), 123 F. 2d 986, cert. denied 316 U. S. 695 (1942); *Commissioner* v. *Halliwell* (2d Cir., 1942), 131 F. 2d 642, cert. denied 319 U. S. 741 (1943).

the jury, his valuation would have revealed itself to be no more than a crude and mischievous joke. However with that fact, together with his conflicting interest excluded, the jury could hardly have been expected to do anything other than to credit Mr. Reynolds.

Jurisdiction of the Court of the First Instance

The United States District Court for the Southern District of New York was the Court of the first instance. That Court had jurisdiction to review the disallowance by the Commissioner of Internal Revenue, of the claim for refund under Title 28 U.S.C., Section 1346(a)(1).

Reasons for Granting the Writ

The *per curiam* opinion of the Second Circuit, expressed and implied, establishes completely novel and equally untenable propositions. It will have an effect on every tax case involving the determination of "fair market value". It may well extend to any type case tried by a judge and jury. Indeed, it creates a bewildering and dangerous precedent which, if left to stand, will leave the law relating to valuation questions in a state of hopeless confusion. Some courts hereafter will no doubt follow the prestigious Second Circuit.

1. The decision of the court below excluding evidence of the straddling sales (i.e., before and after the valuation date) and earnings and the relative price-earning ratios directly conflicts with the holding and reasoning in all reported decisions of this Court, the Circuit Courts, the District Courts, and various State Courts in determining valuations.*

*See in this regard (App'lts Br., pp. 16-18, 20, 22, 24-28, 30 32, 36; Reply Br., pp. 3-4, 6-8, 16-17; Pet. for Rehearing pp. 5-6, 8-10, 14-15, 17); *Elmhurst Cemetery Co.* v. *Commissioner* (1937), 300 U. S. 37: *Minnesota Rate Cases,* 230 U. S. 352; *Commissioner*

(Footnote continued on following page.)

(a) In valuation cases the rule has always been: All evidence which any reasonable person *might* consider material should be admitted.**

It has always been recognized that the best criteria for establishing the "fair market value" of any type of property is comparable sales of the same or similar property.

(Footnote continued from preceding page.)

v. *Duberstein*, 363 U. S. 278; *Sinclair Refrigerating Co.* v. *Jenkins* (1932), 289 U. S. 689; *Couzens* case, 11 BTA 1040; *Rogers* v. *Helvering* (2d Cir., 1939), 107 F. 2d 394; *O'Malley* v. *Ames* (8th Cir., 1952), 197 F. 2d 256; *Fitts' Estate* v. *Commissioner* (8th Cir., 1956), 237 F. 2d 729; *Griffiths* v. *Commissioner* (7th Cir., 1934), 70 F. 2d 946; *Williams* v. *Commissioner* (8th Cir., 1930), 44 F. 2d 467; *Hamm* v. *Commissioner* (8th Cir., 1963), 325 F. 2d 934; *Nelson* v. *Bank* (8th Cir., 1895), 69 Fed. 805; *Snyder's Estate* v. *U. S.* (4th Cir., 1961), 285 F. 2d 857; *White & Wells Co.* v. *Commissioner* (2d Cir., 1931); 50 F. 2d 120; *Pfleghar Hardware Speciality Co.* v. *Blair* (2d Cir., 1929), 30 F. 2d 614; *United States* v. *Featherstone* (10th Cir., 1963), 325 F. 2d 539; *United States* v. *18.46 Acres of Land* (2d Cir., 1963), 312 F. 2d 287, *United States* v. *25.406 Acres of Land* (4th Cir., 1949), 172 F. 2d 990; *Robertson* v. *Routzahn* (6th Cir., 1935), 75 F. 2d 537; *Clayton* v. *Clow* (Dis. Ct. Ill. 1962), 212 F. Supp. 482; *Vale* v. *Dupont, State Tax Commissioner*, 182 A. 663 (Del. 1936).

** (Ap'tls Br., pp. 17-18) Mertens, *Law of Federal Income Taxation*, Vol. 10, Sec. 59.02, Zimit ed.: "Essentially all methods of proof are relevant which would influence any reasonable person in arriving at a determination as to fair market value of property." The Eighth Circuit in *O'Malley* v. *Ames*, 197 F. 2d 256, p. 258, and again in *Fitts' Estate* v. *Commissioner*, 237 F. 2d 729 said: "Among the factors that may properly be considered in determining the fair market value are corporate assets, corporate earnings, dividends, earning power of the corporation, prospects of the corporation, book value, bid and asked quotations, comparison with other stocks sold on the market, and any other factors which an informed purchaser and an informed seller would take into account." Revenue Ruling 59-60, I.R.B. 1959-9, p. 8, Sec. 3 [1954 I.R.C., Sec. 2031 (b)]—"A sound valuation will be based upon all the relevant facts, * * *."

To exclude such evidence will utterly destroy any taxpayer's case* even as the exclusions destroyed petitioner's case.

The pre-trial order, upon stipulation, directed that the agreement of sale of taxpayer's stock in 1953 "be received in evidence at trial without objection * * *" (Ap'lts Br., pp 21-2; Reply Br., pp. 8-10; Pet. for Rehearing, pp. 3, 5, 8-9).

For over five years prior to trial the Internal Revenue Service, the Government and everyone connected therewith recognized, despite its adverse significance, the weight and importance of the 1953 sale. That such a stipulation and consent to the pretrial order was deliberately and willingly given by those thoroughly experienced in valuation cases conclusively establishes the undeniable materiality of the 1953 sale.

But the trial court peremptorily annulled the pretrial order and the stipulation not "to prevent manifest injustice" but the effect of which was to produce injustice (Ap'lts Br., pp. 21-2; Reply Br., pp. 9-10; Pet. for Rehearing, p. 6).

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* "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Beacon Theatres* v. *Westover*, 359 U. S. 500; See also *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500.

As to the importance of reserving for litigants the right to a jury trial see *Wilkerson* v. *McCarthy* (FELA case), 336 U. S. 53 pp. 55, 69:

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." 336 U. S. 70-71.
>
> "* * * the trial by jury may be preserved in name, but will be destroyed in its essential value, and become nothing but the machinery through which the court exercises the functions of a jury without its responsibility." *Slocum* v. *New York Life*, 228 U. S. 364, p. 383.

(b) No court, so far as we know, has ever failed to admit as a "comparable" the sale of all of the stock in question. Of course, material changes intervening between the valuation date and the date of sale may affect the weight of the comparison (Ap'lts Br., pp. 23-7; Reply Br., pp. 4-5, 16-7).

But such an opportunity for comparison has always been sought; for instance in *Hamm* v. *Commissioner* (8th Cir., 1963), 355 F. 2d 934, 936, the court lamented that there had been no sale of the stock in question "prior to the trial", which was eight years after the valuation date (Ap'lts Br., p. 25; Reply Br., p. 7).

This Court in *Elmhurst Cemetery Co.* v. *Commissioner,* (1937), 330 U. S. 37, 40 (Ap'lts Br., pp. 24-5; Reply Br., p. 6), equated the sale of cemetery lots at $1.77 per square foot in 1928 to a proper valuation of 76.6 cents per square foot in 1913—fifteen years before. There this Court reversed the Circuit Court of Appeals and affirmed the Board of Tax Appeals, saying:

> "* * * Prices obtained in later years (1926-8) may be compared to those received in earlier years (1909-13) they were for like things."

In the celebrated *Couzens* case, 11 BTA 1040 (Ap'lts Br., pp. 16, 18, 20, 22, 24, 28), involving a valuation of the Ford Motor Company stock as of March 1, 1913, the Government pinned its entire case upon the earnings-price ratio created by the sale six and a half years after the valuation date (Ap'lts Br., p. 24).

What better "comparables" could obtain than these straddling sales—before and after the critical date—of almost completely identical things—identical newspapers, published in identical towns, identical management, and generally with the same staff, subscribers and advertisers?

By mandate of Congress, the courts are required in the absence of sales of shares of the stock in closely held corporations to consider the sale of the stock of other corpora-

tions in the same industry (I.R.C. Sec. 2301(p), formerly Sec. 811(k) I.R.C. 1939; Ap'lts Br., p. 22).

But such comparisons must be less apt than those excluded below because they would be of different corporations, in different locations, involving different capitalization, customers, reputation, access to supplies and consumers—differing in many respect in elements determining market value. No such differences existed in the "comparables" offered and excluded in the case at bar.

As before mentioned, the courts have heretofore universally recognized that in valuation cases any evidence that any reasonable person might consider material should be admitted (Ap'tls Br., pp. 16, 18, 36; Pet. for Rehearing, pp. 4, 6-11).*

While that prescription could hardly be expanded, it has been endorsed and emphasized by Rule 43(a), of which Judge Learned Hand said in *Pfotzer* v. *Aqua Systems* (2d Cir., 1947), 162 F. 2d 779, 785:

> "When there is a doubt as to the competency of evidence, Federal Rules of Civil Procedure, Rule 43(a) 28 U.S.C.A., following Section 723C, admonishes us to admit it rather than exclude it * * *."

The proper construction and application of a rule of the Federal Rules of Civil Procedure is in itself reason enough for granting a writ of certiorari.**

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* Mr. Justice Cardozo's words in *Sinclair Refrigerating Co.* v. *Jenkins Co.* (1932), 289 U. S. 689, 698 (Reply Br., p. 6, Pet. for Rehearing p. 6), ring true and clear with respect to the excluded evidence:

> "* * * if years have gone by before the evidence is offered experience is then available to correct uncertain prophecy. Here is a book of wisdom that the courts may not neglect. We find no rule of law that sets a clasp upon its pages and forbids us to look within."

** "This case presents an important problem under the Federal Rules of Civil Procedure * * *." *Hickman* v. *Taylor* (1946), 329 U. S. 495, 497.

The wrongful exclusion of vital evidence can be more insidious and harmful than the admission of tainted evidence. This Court has always been alert to protect individuals against the admission of tainted evidence. Where tainted evidence is admitted, the jury at least has the opportunity to reject it (e.g. a confession obtained under duress); however, in the case of the exclusion of vital evidence, the triers of the fact do not have even that slim chance of arriving at a just verdict.

The trial court had only the duty to admit the prior and subsequent sales and their earnings-price ratios and no discretion of any kind to exclude them.

Whatever discretion there may be in trial judges to exclude "fringe comparables" where the similarities are so vague or slight as to be virtually nonexistent, such as the price of soybeans in China or the sale of General Motors stock, there was here only the clear duty to admit the straddling sales—before and after the critical date—of "comparables" almost completely identical.

Obviously, the *best* comparables can never be excluded. After their admission, at what point the lesser comparables, becoming more and more dissimilar, are to be excluded may well be left to the discretion of the trial court.

(c) The mere passage of time, of itself, imposes no limitation on the admission of evidence of sales of "comparables". The courts have repeatedly admitted evidence of sales longer than six years before and after the valuation date (Ap'lts Br., pp. 24-8). In fact this Court in *Elmhurst Cemetery Co.* v. *Commissioner*, 300 U. S. 37, *supra*, pages 6, 9, held that sales thirteen years after the critical date were determinative.

As always, the point is the similarity of the "comparables" and the similarity of conditions existing at the time of sale.

Here, there was never any claim that there was any material change in the six years before the valuation date

or the six years after, except, due to the expected growth of the communities in size and prosperity, there was an upward trend of earnings from 1940 to 1947, and later beginning in 1950 a decrease in earnings due to the unexpected rise in the price of newsprint (Ap'lts Br., p. 14). Thus there were no changes affecting the value of the stock that could not have been readily adjusted on a basis of an earnings-price ratio.

The single authority relied on by the court below (Vol. 10, *Merten's Law of Federal Income Taxation*, Sec. 59.15) does not touch the point of admissibility of evidence. It merely deals with the weight that should be given to admitted evidence.

(d) The court below said that if the 1953 sale had been admitted "the Government would have been permitted to produce detailed evidence of changed conditions between 1947 and 1953." Of course it would. But neither in the court below nor at trial did the Government make any claim as to "detailed evidence of changed conditions". The only changed conditions raised were those that the taxpayer wished to show, namely, an upward trend of earnings followed later by an increase in the cost of newsprint and a decrease in earnings (Ap'lts Br., p. 14).

Under the circumstances here we can conceive of no other material changes or differences that could not have been readily adjusted so far as necessary by a comparison of the profit and loss statements and balance sheets as of the respective dates.

(e) Further, the court below held that "it would have been difficult for the judge to charge laymen intelligently on the limited consideration that should be given to the evidence of changed conditions * * *". In other words, it is impossible to have a jury trial in a valuation case! There have been many such trials and nowhere have we

ever found any difficulty on the part of the judge in properly instructing a jury.*

(f) And again, "* * * or for the jury to understand the limited purpose for which such evidence was admitted in a case already quite complex for a trial by jury."**

We know of no way to increase the jury's understanding by decreasing the pertinent information. What made the case complex was the exclusion of the offered facts which were simple, stipulated and not in dispute.

There seems little question that once a trial judge, departing from the established norm, exercises his power in an unreasonable, arbitrary and capricious way in excluding evidence from a jury which is clearly admissible, he is depriving a litigant of a jury trial by creating a subtle erosion of this statutory right. * * *

(2) The decision of the court below with respect to concealing the interest of a witness from the fact finders is clearly erroneous and we are sure conflicts with all the

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* See *Gould* v. *Granquist* (U.S.T.C., Oregon, 1958), 3 A.F.T.R. 2d 1788, Instruction Nos. 15, 16, 17, 18, 19; *Tucker* v. *Commissioner*, 54-2 U.S.T.C. 47, 032 and *U. S.* v. *25.406 Acres of Land* (4th Cir., 1949), 172 F. 2d 990 (Ap'lts Pet. for Rehearing, pp. 14-15); and also *U. S.* v. *Merz*, 376 U. S. 192, in which this Court held that the District Court should carefully instruct laymen on the law, qualifications of expert witnesses, and the evidence.

** Noting that difficult and complex questions are often tried in the Federal Courts before juries, the Supreme Court in *United Gas Co.* v. *Texas* (1937), 303 U. S. 123, 140-141, said:

> "Cases at law triable by a jury in the federal courts often involve most difficult and complex questions, as, for example, in patent cases at law presenting isues of validity and infringement. (citing cases)."

*** "* * * or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, * * *". Rule 19, Revised Rules of the Supreme Court.

In *Frank* v. *Mangum*, 237 U. S. 309 (1914), the court at pp. 334-5 said: "* * * fundamental rights * * * shall not be taken * * * arbitrarily or without the right to be heard according to the usual course of law in such cases."

reported cases dealing with the subject. The interest of a witness is always an issue.*

While the *per curiam* opinion did not specifically mention the exclusion of the evidence of Mr. Reynolds' adverse interest and bias, it was undoubtedly alluded to in the "catch all" language: "Mrs. Reynolds' other claims of reversible error on the valuation question must fail because here too the trial judge acted well within his discretion in seeking to keep the jury's understanding of this complicated tax case within intelligible boundaries." But the exclusion of Reynolds' interest was lethal to taxpayer's case.

There was no question that Reynolds had an interest in this litigation. It was he who owed and should have paid income taxes in excess of $200,000 (Ap'lts Br., p. 30, Reply Br., pp. 17, 18). But he paid no such tax and in fact did not report the transfer of the stock to petitioner on July 1, 1947. When he testified by deposition prior to trial no one knew better than he that he was looking down the barrel of the possibility of a Government fraud claim

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* 98 C.J.S. pp. 476-8:

"Sec. 539. Witnesses Generally

The interest or bias of a witness may be shown and considered as bearing on the credit which should be accorded to his testimony.

The fact that a witness is interested in the result of the action or proceeding in which he testifies, or is biased or prejudiced in favor of or against any of the parties thereto, is proper to be shown and considered as bearing on the credit which should be accorded to his testimony; and where the interest or bias is denied by the witness, it may be shown by the testimony of others, and even where such interest or bias is admitted, the extent of it may be shown. Testimony from an interested witness need not be believed *and cannot be accepted as conclusive, especially where a mere matter of opinion or judgment,* * * *" (emphasis supplied)

It was held in *Majestic* v. *Louisville & N. R. Co.*, 147 F. 2d 621, 627 (6th Cir., 1945), "cross examination to show bias or interest covers a wide range" and "the field from which probable bias or interest may be inferred is infinite".

See for e.g., *Uncasville Mfg. Co.* v. *Commissioner*, 55 F. 2d 893 (Pet. for Rehearing, p. 13).

(Ap'lts Br., pp. 30-2, Reply Br., 17-8, Pet. for Rehearing, p. 13). His interests were diametrically opposed to those of the plaintiff, yet all of this was excluded from the jury (Ap'lts Br., pp. 14, 15, 30-31).

Reynolds was not just *a* witness. He was the man who had bought the papers in 1940 and managed them through the years thereafter. "Foisted off" on the jury as disinterested, he was accepted by them as *the* witness. Quite expectedly, the jury adopted his stated valuation to the penny.

Placing Reynolds in the sanctimonious position of being omniscient without permitting his interest to be disclosed was such a flouting of a rule of general application and prime importance that *per se* it certainly constituted a denial of due process of law.

If so well settled and fundamental doctrines are blatantly set aside and peremptorily disregarded, and stipulations between counsel, signifying nothing but the truth, honestly and deliberately made, and entered into after considerable thought are scrapped at a moment's notice, then our constitutional provisions guaranteeing us liberty in our property become only noble sentiments of the past.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted, and we respectfully suggest that under the circumstances this Court may well deem a summary reversal appropriate.

Respectfully submitted,

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APPENDIX A

PER CURIAM:

Mrs. Reynolds sued the United States to recover $58,990.05, plus interest, paid by her in Federal income taxes for the fiscal years 1953 and 1954. A jury by special verdict found that she was entitled to a partial refund of $16,764.16. Mrs. Reynolds appeals from the judgment entered upon that special verdict insofar as it failed to award her the full recovery she sought.

At the trial the principal problem was to determine the fair market value of a one-third interest in the common stock of Southwestern Publishing Co. and Southwestern Co. on July 1, 1947, see I.R.C. of 1939, § 113(a), which Mrs. Reynolds had received on that date by the terms of a property settlement incident to a divorce. In order to determine the amount of gain realized by the taxpayer from the sale of the property during 1953 and 1954 when she received installments of the selling price, it was necessary to determine the adjusted basis, as defined in Section 113(b) of the I.R.C. of 1939, of taxpayer's stock in the two corporations.

The jury's special verdict fixing the value of the two blocks of stock at $300,000 was supported by the evidence. Mrs. Reynolds argues, however, that the trial judge committed reversible error in excluding evidence of the 1953 sale by her of the same stock to the corporations for $900,000 as a proper basis for evaluation of the fair market value in 1947. But we recognize that because this case was tried before a jury, the trial judge had wide discretion in admitting or excluding evidence on the valuation question and we cannot say that he abused his discretion. He quite properly may have deemed the 1953 sale too remote in time to furnish evidence of the value of the stock in 1947, see 10 Mertens, Law of Federal Income Taxation, § 59.16 (Zimet ed. 1958); or, the trial judge might have

recognized that if the evidence was admitted, the Government would have been permitted to produce detailed evidence on changed conditions between 1947 and 1953. In that event it would have been difficult for the judge to charge laymen intelligibly on the limited consideration that should be given to the evidence of changed conditions or for the jury to understand the limited purpose for which such evidence was admitted in a case already quite complex for trial by jury. Mrs. Reynolds' other claims of reversible error on the valuation question must fail because here too the trial judge acted well within his discretion in seeking to keep the jury's understanding of this complicated tax case within intelligible boundaries.

Mrs. Reynolds also contests the jury's findings with respect to the deductibility of legal and accounting expenses incurred in three different matters in 1953 and 1954. We have carefully considered her claims on these questions and find them lacking in merit.

We therefore affirm the judgment in all respects.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 969

EDITH R. REYNOLDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Southern District of New York wrote no opinion. The *per curiam* opinion of the court of appeals (Pet. 16–17) is reported at 338 F. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 1964 (III–R. 24a), and a petition for reharing was denied on December 11, 1964 (III–R. 46a–52a). The petition for a writ of certiorari was filed on March 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether in connection with the jury's determination of the basis (fair market value) of stock received in 1947 under the terms of a property settlement the trial court arbitrarily excluded evidence of a 1953 sale of the stock.

2. Whether the trial court arbitrarily excluded evidence of a witness' alleged bias.

STATEMENT

In accordance with a marital settlement incident to a divorce, taxpayer received, on July 1, 1947, a one-third interest in the outstanding common stock of the Southwestern Publishing Company and the Southwestern Company. Approximately six years later, in 1953, taxpayer sold the shares to the issuing corporations for a total consideration of $900,000. (Pet. 16.) For the purpose of computing the gain on the sale, it was necessary to determine the adjusted basis of the stock which, in this instance, was equivalent to its fair market value on the date of acquisition. On her 1953 return, taxpayer claimed that the value was $850,000; the Commissioner, on the other hand, determined that it was $202,894.34. (I–R. 10a.)

At the trial, both parties offered expert testimony on the question of valuation. Taxpayer's expert valued the stock at $981,667. (Tr. 120.) [1] The government's expert testified to a value of $188,516.67. (II–R. 4b.) As part of her case-in-chief, taxpayer read into the record portions of the deposition of her former husband, Donald W. Reynolds. (Tr. 48–88.)

[1] "Tr." references are to the transcript of proceedings.

At that time, taxpayer established the expertness of Mr. Reynolds. (Tr. 57; II–R. 21b.) The government was then permitted to read those parts of the deposition containing its cross-examination of Mr. Reynolds.[2] (Tr. 88.) It was Mr. Reynolds' opinion—as brought out in that cross-questioning—that the fair market value of the shares was $300,000. (Tr. 99.) When taxpayer thereafter attempted to impeach Mr. Reynolds' credibility because of an alleged adverse interest relating to the valuation of the stock, the trial court sustained the government's objection. (Tr. 109–110.) At another point in the proceedings, taxpayer offered the 1953 sales price as a proper basis for determining the fair market value as of 1947. The trial court excluded this evidence. (Tr. 429–430.) The jury returned a special verdict fixing the value of the stock at $300,000 on the date of acquisition. The court of appeals held that the jury's verdict was supported by the evidence and that the rulings of the trial court were within its sound discretion. (Pet. 16–17.)

ARGUMENT

This case involves nothing more than the soundness of the district court's evidentiary rulings. Petitioner's objections were fully considered and properly rejected by the court below. There is no conflict or other circumstance which would warrant further review.

---

[2] Although the government reserved the right to introduce the Reynolds deposition when it went forward with its evidence, it never did so.

1. Taxpayer asks this Court to hold that the trial court had no discretion whether to permit in evidence, before the jury, the 1953 sales price of the two blocks of stock for purposes of proving their market value some six years earlier (on the date of acquisition). This contention ignores the well established principle that in jury cases the trial court has wide authority to exclude matters having only slight bearing on the controverted issues. *E.g., United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 230–231; *Great American Insurance Co.* v. *Horab,* 309 F. 2d 262, 265 (C.A. 8); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.,* 297 F. 2d 906, 912–913 (C.A. 2), certiorari denied, 369 U.S. 865, petition for rehearing denied, 370 U.S. 920; *Yoham* v. *Rosecliff Realty Co.,* 267 F. 2d 9, 10 (C.A. 3); *Frank R. Jelleff, Inc.* v. *Braden,* 233 F. 2d 671, 679–680 (C.A.D.C.). If the probative worth of an offer is outweighed by the likelihood of its confusing or misleading the jury it may be excluded (*United States* v. *Socony-Vacuum Oil Co., supra; Yoham* v. *Rosecliff Realty Co., supra;* Uniform Rules of Evidence, Rule 45) and, on occasion, must be excluded (*Shepard* v. *United States,* 290 U.S. 96, 104).[3] It is for the trial court to strike the balance, subject to review only for abuse. Here, the court of appeals could find no such abuse because the trial court "quite properly may have deemed the 1953 sale too remote in time to furnish evidence of the value of the stock in 1947". (Pet. 16.) There are countless cases holding that sales are not trustworthy

[3] "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

proof of value when they occur a substantial period of time from the valuation date. *Fitts' Estate* v. *Commissioner,* 237 F. 2d 729, 731 (C.A. 8) (sales 3 years prior and 5 years subsequent are too remote); *Williams* v. *Commissioner,* 44 F. 2d 467, 469 (C.A. 8) (7 years prior, too remote); *Evans* v. *Commissioner,* 29 B.T.A. 710, 716 (10 years subsequent, too remote); *First National Bank of Birmingham* v. *Commissioner,* 29 B.T.A. 352, 354–355 (one year prior, too remote); *American Steel Wool Mfg. Co.* v. *Commissioners,* 14 B.T.A. 762 (one year prior, too remote); *Estate of Weingarten* v. *Commissioner,* 13 B.T.A. 249, 254 (4 years subsequent, too remote); *Flowers* v. *Commissioner,* decided January 30, 1963 (P–H Memo T.C. par. 63,027) (sales 4 and 5 years prior, too remote); *Otley* v. *Commissioner,* decided August 16, 1954 (P–H Memo T.C. par. 54,232) ("Sales occurring in 1930 and 1931 are slight evidence of fair market value in 1932"); 10 Mertens, Law of Federal Income Taxation (Zimet Rev.), §§ 59.07, 59.16.[4] Moreover,

[4] Taxpayer relies on in *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U.S. 37, for the purpose of showing that sales have been considered "fifteen years before" (Pet 9) and "thirteen years after the critical date" (Pet. 11). Taxpayer, however, misreads that case. The issue in the case was the basis of cemetery lots (which happened to be fair market value) on March 1, 1913, which was necessary to compute the gain on cemetery lots sold in 1926, 1927 and 1928. The average selling price of cemetery lots between 1912 and 1913 was 76.6 cents per square foot. 300 U.S. at 38. This Court held it was proper to fix the fair market value, on March 1, 1913, at 76.6 cents per square foot. *Id.* at 39. Nowhere in the opinion was a doctrine announced which would allow a determination of fair market value on evidence of sales thirteen years from the valuation date.

as the court of appeals pointed out, if evidence of the sale six years subsequent to the acquisition date had been admitted, "the Government would have been permitted to produce detailed evidence on changed conditions" and "it would have been difficult for the judge to charge laymen intelligibly on the limited consideration that should be given to" such evidence. (Pet. 16–17.) In view of the slight probative value of the 1953 sale, and the probability of confusion entailed by its admission, it cannot be said that the trial court abused its discretion in its exclusionary ruling. See *Yoham* v. *Rosecliff Realty Co., supra.* Whether it might have constituted an abuse if the 1953 sale had been excluded and there were no other evidence more proximate to the valuation date is not a question in this case. The jury's special verdict fixing value was supported (Pet. 16) and taxpayer makes no claim to the contrary.

2. Likewise without merit is the assertion that the trial court erred in excluding evidence that taxpayer's former husband, Mr. Reynolds, paid no tax on the appreciated value of the stock when he transferred it to taxpayer in 1947 (pursuant to the marital agreement). (Pet. 5–6, 13–15.) Taxpayer maintains that this would have shown Mr. Reynolds' self-interest in testifying to a low value on the valuation date. However, the trial court was plainly within bounds in halting a burdensome collateral inquiry into Mr. Reynolds' tax liability, a survey which would have been indecisive at best. In 1947, when the marital agreement was made, the law was unclear whether such a transaction constituted a taxable event. Doubts were

not finally put to rest until 1962 when this Court decided *United States* v. *Davis,* 370 U.S. 65. In addition, at the time Mr. Reynolds' deposition was taken, his 1947 tax liability was fixed since limitations had long expired. It, therefore, does not appear that Mr. Reynolds had an interest adverse to his wife. In rejoinder, taxpayer claims that Mr. Reynolds might still be subject to a fraud investigation (not covered by a limitations period). (Pet. 14–15.) However, the record does not contain the slightest intimation of fraud; nor did taxpayer make an offer of proof to that effect.

Since taxpayer states that Mr. Reynolds was an expert witness for the government, it should be noted that Mr. Reynolds' testimony, in deposition form, was read into the record *as part of taxpayer's case.* (Pet. 15; Tr. 48–88.) The use made of the Reynolds deposition by the government was simply to bring out its cross-examination. (Tr. 88.) The trial judge understood Mr. Reynolds to be taxpayer's witness (see I–R. 25a), and taxpayer did not claim otherwise.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

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PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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1. It is significant that the Government suggests nothing in defense of the trial court's action of peremptorily annulling the pre-trial order, wherein the Government had stipulated that the excluded evidence should be admitted without objection.

The Government also ignores the necessary effect and interpretation of Federal Rule 43 (a).

2. Anything in the Government's brief to the contrary notwithstanding, Mr. Reynolds was qualified by the Government as an expert witness and, as such, his opinion solicited by the Government (Tr. pp. 89 *et seq.*) and he was adversely interested in that he was wide open to a fraud claim by the Government for not reporting the taxable

transfer in the marital settlement (Aplts.' Br., pp. 30-2, Reply Br., 17-8, Pet. for Rehearing, p. 13).

In 1941 and 1942 the Third and Second Circuits had held that such a transfer in a marital settlement as was made by Mr. Reynolds in 1947, was a taxable transaction. In both cases certiorari was denied. That continued to be the accepted law until 1961 (fourteen years after 1947) when the question was again agitated, which agitation was set at rest by this Court in *Davis* v. *United States*, 370 U. S. 65, in accordance with the prior cases (Reply Br., pp. 17-8).

Mr. Reynolds never reported the transfer. No one knew better than he that he was faced with a fraud claim (Aplts.' Br., pp. 30-2, Reply Br., 17-8, Pet. for Rehearing, p. 13). In any event, the jury surely could have found that Reynolds' fear of such a claim by the Government influenced his testimony.

The Government's statement at page 7 of its brief: "The trial judge understood Mr. Reynolds to be taxpayer's witness (see I. R., 25a) and the taxpayer did not claim otherwise" is utterly erroneous. The taxpayer was forced to take Mr. Reynolds' deposition to prove certain financial facts (e.g., the earnings of the businesses, etc.). Petitioner never sought Mr. Reynolds' opinion as to anything. It was the Government who qualified him as an expert and used him as such (Tr., p. 89, *et seq.*). There was never any dispute about it and until now no claim to the contrary.

3. The one thing clearly established in the cases cited by the Government at pages 4 and 5 of its brief is that no court has ever before excluded as a "comparable" sales of the same shares.* In all of the cases cited as "too

* Petitioner sorrowfully notes that the Government has continued its "win at all costs" attitude in the misleading footnote reference (Br., p. 5). The *Elmhurst* case admitted evidence of subsequent sales (fifteen years subsequent) saying: "* * * Prices obtained in the latter years (1926-8) may be compared with those received in the earlier ones (1909-13)—they were for like things." 300 U. S. 37, 40.

remote" by the Government, the sales were in fact admitted and considered by the triers of the facts, and given more or less weight as the triers of the fact deemed proper. But in the case at bar the jury was precluded from all opportunity of discharging its constitutional function.

The Government claims only (Br., p. 4) that the trial court's discretion is limited "to exclude matters having only slight bearing on the controversial issues." That is our position (Pet. for Cert., p. 11). But here the trial court excluded not only the prime "comparables" but also all "comparables" and proof of earnings and thereby effectively eviscerated the plaintiff's case.

4. In summary, this taxpayer has been held liable for over $200,000 when, we confidently submit, no jury in possession of all the relevant facts, would hold that she owed one American penny. Such an unjust deprivation of property is so substantial as to change her and her children's way of living—it equals a deprivation of liberty or confinement for a period in a penitentiary. To be blunt, no taxpayer can be assured a fair trial if the arbitrary action of the trial court is permitted to stand. We again suggest that this Court may summarily reverse.

Respectfully submitted,

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